FILED
MAY 19 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

35

No. 05-380

IN THE

Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
Petitioner,

v.

LEROY CARHART, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONER

ANDREW L. SCHLAFLY
939 OLD CHESTER ROAD
FAR HILLS, NJ 07931
(908) 719-8608

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether, notwithstanding Congress's determination that a health exception was unnecessary to preserve the health of the mother, the Partial-Birth Abortion Ban Act of 2003 is invalid because it lacks a health exception or is otherwise unconstitutional on its face.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. THE REASONING IN *OAKLAND CANNABIS BUYERS' COOP.* MILITATES AGAINST REQUIRING A HEALTH EXCEPTION TO A GENERALLY APPLICABLE CRIMINAL STATUTE	5
II. JUDGMENT FOR PETITIONER IS REQUIRED BY *UNITED STATES V. SALERNO*	9
A. The Partial-Birth Abortion Ban Act Has Constitutional Applications, and This Facial Challenge Must Fail	9
B. An Unconstitutional Application of the Partial-Birth Abortion Ban Act Is Unlikely Ever to Occur	12
III. THIS COURT SHOULD RETURN ISSUES OF HEALTH AND ABORTION TO THE DEMOCRATIC PROCESS, AND THEREBY OVERRULE *STENBERG V. CARHART* AND *DOE V. BOLTON*	14
A. *Stenberg v. Carhart* and *Doe v. Bolton* Should be Overruled	14
B. Performed Under the Guise of "Health", Abortions Have a Very Unhealthy Effect	17
C. The Democratic Process Is Superior to the Judiciary for Sorting Out Health Issues	21
CONCLUSION	24

TABLE OF AUTHORITIES

CASES	Page
Ayotte v. Planned Parenthood, 126 S. Ct. 961 (2006)	11
Barnes v. Moore, 970 F.2d 12 (5th Cir.), *cert. denied*, 506 U.S. 1013 (1992)	10
Carhart v. Gonzales, 413 F. 3d 791 (8th Cir. 2005)	3, 7
City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983)	6, 21
Colautti v. Franklin, 439 U.S. 379 (1979)	15
Doe v. Bolton, 410 U.S. 179 (1973)	*passim*
El Paso & Northeastern v. Gutierrez, 215 U.S. 87 (1909)	9
Employment Div. v. Smith, 494 U.S. 872 (1990)	7
Gilligan v. Morgan, 413 U.S. 1 (1973)	21
Gonzales v. Raich, 545 U.S. 1 (2005)	8
Gooding v. Wilson, 405 U.S. 518 (1972)	12
Greenville Women's Clinic v. Comm'r, S.C. Dept. of Health & Envtl. Control, 317 F.3d 357 (4th Cir. 2002), *cert. denied*, 538 U.S. 1008 (2003)	10-11
Manning v. Hunt, 119 F.3d 254 (4th Cir. 1997)	11
McCorvey v. Hill, 385 F.3d 846 (5th Cir. 2004), *cert. denied*, 125 S. Ct. 1387 (2005)	23
McGuire v. Reilly, 386 F.3d 45 (1st Cir. 2004), *cert. denied*, 125 S. Ct. 1827 (2005)	10
Okpalobi v. Foster, 244 F.3d 405 (5th Cir. 2001)	11
Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833 (1992)	*passim*
Rancho Viejo, LLC v. Norton, 334 F.3d 1158 (D.C. Cir. 2003), *cert. denied*, 541 U.S. 1006 (2004)	9
Roe v. Wade, 410 U.S. 113 (1973)	3, 11, 23
Rust v. Sullivan, 500 U.S. 173 (1991)	11

TABLE OF AUTHORITIES—Continued

	Page
Schneider v. New Jersey, 308 U.S. 147 (1939)	11-12
Stenberg v. Carhart, 530 U.S. 914 (2000)	*passim*
Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986)	16
United States v. Bailey, 444 U.S. 394 (1980)	8
United States v. Oakland Cannabis Buyer's Coop., 532 U.S. 483 (2001)	*passim*
United States v. Raines, 362 U.S. 17 (1960)	9
United States v. Rutherford, 442 U.S. 544 (1979)	8
United States v. Sabri, 541 U.S. 600 (2004)	10
United States v. Salerno, 481 U.S. 739 (1987)	*passim*
United States v. Vuitch, 402 U.S. 62 (1971)	14, 15
Virginia v. Black, 538 U.S. 343 (2003)	10
Webster v. Reproductive Health Services, 492 U.S. 490 (1989)	11
Yazoo & Mississippi Valley R. Co. v. Jackson Vinegar Co., 226 U.S. 217 (1912)	9

STATUTE AND LEGISLATIVE MATERIALS

18 U.S.C. § 1531(a)	5-6
18 U.S.C. § 1531(b)(1)	4
Partial-Birth Abortion Ban Act of 2003 § 2(8), Pub. L. No. 108-105, 117 Stat. 1201	13

ARTICLES, BOOKS AND OTHER AUTHORITIES

N. Abdullaev, "Russians are quickest to marry and divorce," *Moscow Times* (Dec. 8, 2004)	20
Information packet, Women's Environment and Development Organization (WEDO) World Conference on Breast Cancer (July 1997)	20
A. Khan, "The role of fat in breast cancer," *The Independent* (May 18, 1998)	20
1 W. LaFave & A. Scott, Substantive Criminal Law (1986)	5

TABLE OF AUTHORITIES—Continued

Page

Angela Lanfranchi, M.D., F.A.C.S, "The breast physiology and the epidemiology of the abortion breast cancer link," 12 Imago Hominis, No. 3, 228 (2005), http://www.abortionbreastcancer.com/Lanfranchi060201.pdf 19

Karen Malec, "The Abortion-Breast Cancer Link: How Politics Trumped Science and Informed Consent," 8 J. Am. Physicians & Surgeons 41 (Summer 2003), http://www.jpands.org/vol8no2/malec.pdf 18, 19

March of Dimes, *Complications of Premature Birth*, http://www.marchofdimes.com/prematurity/5512.asp 17

K. O'Flaherty, R. Oakley, "Self-checks 'useless' in breast cancer fight," *Sunday Tribune* (Ireland), (Oct. 6, 2002) 20

R. O'Reilly, "New weapon in war against breast cancer," *The Press Association Ltd.* (Dec. 17, 1998) 20

"Portugal abortion referendum," *Associated Press Worldstream* (June 27, 1998) 20

"Probability of breast cancer in American Women," National Cancer Institute (Apr. 15, 2005) http://cis.nci.nih.gov/fact/5_6.htm 20

D.C. Reardon, P.G. Ney, F.J. Scheuren, J.R. Cougle, P.K. Coleman, T. Strahan, "Deaths associated with pregnancy outcome: a record linkage study of low income women," 95 Southern Medical Journal 8 (August 2002) 18

Brent Rooney, Letter, 96 European Journal of Obstetrics & Gynecology and Reproductive Biology, 239 (2001) 18

TABLE OF AUTHORITIES—Continued

Page

Brent Rooney and Byron C. Calhoun, "Induced Abortion and Risk of Later Premature Births," 8 J. Am. Physicians & Surgeons 46 (Summer 2003), http://www.jpands.org/vol8no2/rooney.pdf 17

Testimony of Sandra Cano before the United States Senate Committee on the Judiciary (June 23, 2005), http://judiciary.senate.gov/testimony.cfm?id=1553&wit_id=4393 ..... 3, 16

J.M. Thorp, Jr., K.E. Hartmann, and E.M. Shadigian, "Long-Term Physical & Psychological Health Consequences of Induced Abortion: Review of the Evidence," 58 OB/GYN Survey 1 (2003) 18

Laurence Tribe, *American Constitutional Law* (2d ed. 1988) 16

IN THE

Supreme Court of the United States

No. 05-380

ALBERTO R. GONZALES, ATTORNEY GENERAL,
Petitioner,

v.

LEROY CARHART, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE* [1]

Eagle Forum Education and Legal Defense Fund ("Eagle Forum ELDF") is an Illinois nonprofit corporation organized in 1981. Eagle Forum ELDF is a pro-family group that has long advocated judicial restraint and fidelity to the text of the

---

[1] This brief is filed with the written consent of all parties. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

U.S. Constitution. In the abortion context, Eagle Forum ELDF opposes overreaching by federal courts in reviewing laws passed by the legislative branch. Eagle Forum ELDF has a strong interest in ensuring adherence by federal courts to their limited role set forth in the Constitution, and submits this brief in support of applying the same principles to abortion cases as are applied to other areas of law.

SUMMARY OF ARGUMENT

This Court should conform abortion jurisprudence to the same rules that govern other areas of law, and hold for Petitioner. The time has come to end the "health exception" to abortion statutes and, in the process, end the "abortion exception" to the Rule of Law. It is long overdue to apply the same principles of jurisprudence to abortion providers as to everyone else. The frustration of the will of the American people, through their duly elected representatives in both the legislative and executive branches, has persisted only because abortion providers receive preferential treatment in litigation. This must stop, and the Partial-Birth Abortion Ban Act of 2003 should be held constitutional.

Federal criminal statutes concerning medication, for example, are not undermined by a court-imposed "health exception." A federal ban against the sale of marijuana is fully enforceable even though there is no exception based on medical need. This Court rejected, without dissent, the argument that federal regulation of medications must include a health exception. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001). Federal criminal statutes cannot be held hostage to speculation in court about what is good for one's health. That determination is made by Congress when it enacts such laws, and is corrected by Congress as needed. The court below erred in insisting on a health exception to the Partial-Birth Abortion Ban Act of 2003.

Abortion law should also be brought into conformity with the principle that a facial challenge can succeed only if there are no circumstances in which the legislation may be applied constitutionally. *United States v. Salerno*, 481 U.S. 739, 745 (1987). That precedent represents an essential limitation on judicial power with respect to the legislation of conduct. Courts are tribunals for adjudicating facts, not for second-guessing legislation in a factual vacuum. Yet abortion providers have been above this Rule of Law, and courts straining to hold in their favor have failed to distinguish *Salerno*. The court below even conceded that its decision is "fundamentally inconsistent" with *Salerno*. *Carhart v. Gonzales*, 413 F.3d 791, 794 (8th Cir. 2005). It is as though we have two different constitutions: one that favors abortion providers and one for everyone else. But the holding of *Salerno*, which has been uniformly successful, cannot be ignored forever in the abortion context. Applying *Salerno* here requires judgment in favor of Petitioner.

At the root of the duplicity for abortion is the companion case to *Roe v. Wade*, 410 U.S. 113 (1973), which created an unlimited health exception to abortion laws. *Doe v. Bolton*, 410 U.S. 179 (1973). This Court should overrule *Bolton* along with *Stenberg v. Carhart*, 530 U.S. 914 (2000). Last year the "Doe" in the *Bolton* case, Sandra Cano, testified before the United States Senate Committee on the Judiciary that she "did not seek an abortion" and actually had "to flee to Oklahoma to avoid the pressure being applied to have the abortion scheduled for [her] by [her] attorney."[2] It was pure fiction to pretend she sought an abortion, and the broad health exception pronounced in that decision was baseless. That holding should be overruled here.

---

[2] Testimony of Sandra Cano before the United States Senate Committee on the Judiciary (June 23, 2005), http://judiciary.senate.gov/testimony.cfm?id=1553&wit_id=4393 (viewed May 12, 2006).

Once given a preference, abortion providers and their powerful advocates are obviously determined not to relinquish it, as illustrated by the tortuous judicial confirmation hearings. But inevitably the logic of the law will prevail, and abortion jurisprudence will be brought back in line with everything else. The authorization by the courts below of the barbaric practice of partial-birth abortion reflects the vice of preferential treatment for abortion providers.[3] Once the Court applies its precedents across-the-board, the exploitation will stop.

Rule of Law requires denying legal claims for health exceptions to criminal statutes, rejecting facial challenges to laws permitting constitutional application, and overruling *Stenberg v. Carhart* and *Doe v. Bolton*. Just as a business should not improperly maintain two sets of books, there should not be a different set of rules in court for abortion providers. Instead, challenges to a federal law against abortion should be handled like objections to other federal laws. Only one result is appropriate here: a remand for entry of judgment for Petitioner.

---

[3] In this brief the term "partial-birth abortion" has the meaning defined in the governing statute, 18 U.S.C. § 1531(b)(1) ("the term 'partial-birth abortion' means an abortion in which the person performing the abortion—(A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and (B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus").

ARGUMENT

I. THE REASONING IN *OAKLAND CANNABIS BUYERS' COOP.* MILITATES AGAINST REQUIRING A HEALTH EXCEPTION TO A GENERALLY APPLICABLE CRIMINAL STATUTE.

This Court upheld, without dissent, the federal law prohibiting the manufacture and distribution of marijuana against a challenge based on medical need. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001). The claim there of medical need is legally indistinguishable from the claim here for a health exception. There the issue concerned the argument that patients, some of whom suffered from devastating illnesses, have a medical need for marijuana. The plaintiffs there challenged a federal law interfering with patients' access to the drug. Here the issue concerns a claim that patients have a medical need for partial-birth abortion, a procedure prohibited by federal statute. The central question is the same in both cases: must Congress create a health exception to a generally applicable criminal law? The answer in *Oakland Cannabis Buyers' Coop.* was an emphatic "no". Although the Court declined to reach constitutional arguments in that case, there can be no doubt that the Constitution did not require a different outcome. Likewise, there should be no judicially imposed, open-ended health exception to a generally applicable law concerning abortion.

"Under any conception of legal necessity, one principle is clear: The defense cannot succeed when the legislature itself has made a 'determination of values.'" *Id.* at 491 (quoting 1 W. LaFave & A. Scott, Substantive Criminal Law § 5.4, p. 629 (1986)). Here, Congress made a "determination of values" concerning whether there should be a health exception to a federal ban on partial-birth abortion. Congress exhaustively reviewed all the considerations and decided against a health exception beyond saving the life of the mother. 18 U.S.C.

§ 1531(a) (allowing only "a partial-birth abortion that is necessary to save the life of the mother"). The judiciary should not overturn this "determination of values" by a co-equal branch of government. There is no constitutional basis for a court to impose its different opinion about an alleged medical need.

This Court did not attempt to pass judgment in *Oakland Cannabis Buyers' Coop.* on the medical validity of a claim of need for marijuana, any more than it should attempt here to decide whether partial-birth abortion has a medical justification. "Courts are ill-equipped to evaluate the relative worth of particular surgical procedures." *Stenberg v. Carhart*, 530 U.S. 914, 968 (2000) (Kennedy, J., dissenting). The basis for Justice Kennedy's observation is clear. "The legislatures . . . have superior factfinding capabilities in this regard." *Id.* Justice Kennedy noted that this "general rule extends to abortion cases," quoting Justice O'Connor for the proposition that "the Court is not suited to be 'the Nation's *ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States.'" *Id.* (quoting *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 456 (1983) (O'Connor, J., dissenting, internal quotation marks omitted)).

The controversy of abortion is itself shifting to the regulation of drugs, such as the abortion drug formerly known as "RU-486." There is no end to the legal quagmires if a health exception were required of generally applicable criminal statutes concerning drugs or procedures. Imposing such a rule on federal drug laws, as logic would require if applied to abortion procedures, would immediately render federal drug laws powerless. The law would become whatever any doctor says it is, as a single medical opinion becomes more powerful than Congress, the President, and the Supreme Court combined. "Requiring Nebraska to defer to Dr. Carhart's judgment is no different from forbidding Nebraska to enact a ban

at all; for it is now Dr. Leroy Carhart who sets abortion policy for the State of Nebraska, not the legislature or the people. *Casey* does not give precedence to the views of a single physician or a group of physicians regarding the relative safety of a particular procedure." *Stenberg v. Carhart*, 530 U.S. at 965 (Kennedy, J., dissenting).

Alluding to "substantial medical authority," as the court below did, is no solution. *Carhart v. Gonzales*, 413 F.3d 791, 796 (8th Cir. 2005). Abortion providers comprise a tiny percentage of the medical profession, and their self-interested claims can hardly be considered objective. Congress surely has the constitutional power to hear and consider evidence from all sources, not just those profiting from the procedure, in determining its necessity. Congress already makes these judgments in laws concerning narcotics, the approval of new medications, and alternative therapies. If "substantial medical authority" were enough to trigger a constitutionally mandated exemption to a generally applicable federal criminal law, then federal drug laws would become ineffective overnight. Even in the context of an express constitutional right, such as the free exercise of religion, this Court has rejected attempts to create constitutionally mandated exceptions to generally applicable laws. *Employment Div. v. Smith*, 494 U.S. 872, 878-79 (1990).

Three Justices concurred in the judgment in *Oakland Cannabis Buyers' Coop.*, writing separately to leave open the possibility that patients themselves may still enjoy a medical necessity defense to laws banning certain drugs. *Oakland Cannabis Buyers' Coop.*, 532 U.S. at 499-503 (Stevens, Souter and Ginsburg, JJ., concurring). But that reservation has no greater bearing on this case than it did there, because no patients here have presented any specific claims for medical need. A claim by a patient that she would suffer enormously without marijuana does not require a health exception; nor should a claim that a patient would suffer without a partial-

birth abortion require an exception. Moreover, there is no such specific claim by a patient of medical necessity here, rendering this an even easier case than the drug litigation. As Justice Stevens recently wrote for the Court in rejecting a claim for drugs on behalf of suffering patients, "[b]ut perhaps even more important than [the] legal avenues is the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of Congress." *Gonzales v. Raich*, 545 U.S. 1, 125 S. Ct. 2195, 2215 (2005). This suggestion applies here also.

The concurring Justices in *Oakland Cannabis Buyers' Coop.* did express another reservation about the majority decision. They worried about conflict between federal and state law concerning the alleged medical need for narcotics. 532 U.S. at 502. Several states have passed laws, typically by referendum, establishing a medical exemption for allegedly medical use of narcotics. But no such conflict presents itself here, as no states have enacted laws legalizing partial-birth abortion. Moreover, as the Court majority observed in rejecting this concern about federalism, "we are 'construing an Act of Congress, not drafting it.'" *Id.* at 495 (quoting *United States v. Bailey*, 444 U.S. 394, 415 n.11 (1980)).

A requirement of an amorphous health exception amounts to little more than legislating from the bench, an approach that was expressly rejected in *Oakland Cannabis Buyers' Coop.* "As we have stated: 'Whether, as a policy matter, an exemption should be created is a question for legislative judgment, not judicial inference.'" 532 U.S. at 490 (quoting *United States v. Rutherford*, 442 U.S. 544, 559 (1979)). It is for Congress, not the judiciary, to consider whether to include a health exception in a criminal statute. Congress agreed here on only a limited health exception, and that determination should not be disturbed. "It is hardly necessary to repeat what this court has often affirmed, that an act of Congress is not to be declared invalid except for reasons so clear and

satisfactory as to leave no doubt of its unconstitutionality." *El Paso & Northeastern v. Gutierrez*, 215 U.S. 87, 96 (1909). Those "clear and satisfactory" defects are absent here, and this Court should declare the Partial-Birth Abortion Ban Bill of 2003 to be constitutional.

A remand for entry of judgment for Petitioner is warranted.

II. JUDGMENT FOR PETITIONER IS REQUIRED BY *UNITED STATES V. SALERNO*.

There has been no application of the Partial-Birth Abortion Ban Act of 2003, and no evidence that all implementations of the statute would be unconstitutional. Application of the partial-birth abortion statute to healthy women who have no medical need of the procedure would be plainly constitutional. Accordingly, *United States v. Salerno* requires dismissal of this action. 481 U.S. 739, 745 (1987) ("the challenger must establish that no set of circumstances exists under which the Act would be valid"). *See also Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003), *cert. denied*, 541 U.S. 1006 (2004) (Roberts, J., dissenting) (noting that "a facial challenge can succeed only if there are no circumstances in which the Act at issue can be applied without violating the" Constitution).

A. The Partial-Birth Abortion Ban Act Has Constitutional Applications, and This Facial Challenge Must Fail.

As Justice Souter recently wrote for the Court in rejecting a challenge to another federal criminal statute:

> [F]acial challenges are best when infrequent. See, *e.g.*, *United States v. Raines*, 362 U.S. 17, 22, 4 L. Ed. 2d 524, 80 S. Ct. 519 (1960) (laws should not be invalidated by "reference to hypothetical cases"); *Yazoo & Mississippi Valley R. Co. v. Jackson Vinegar Co.*, 226 U.S. 217, 219-220, 57 L. Ed. 193, 33 S. Ct. 40 (1912)

> (same). Although passing on the validity of a law wholesale may be efficient in the abstract, any gain is often offset by losing the lessons taught by the particular, to which common law method normally looks.

Sabri v. United States, 541 U.S. 600, 608-09 (2004). *See also Virginia v. Black*, 538 U.S. 343, 374 (2003) (quoting *Salerno*, 481 U.S. at 745). No one has ever articulated a plausible reason for ignoring this Rule of Law in favor of abortion providers. This Court should end their preferential treatment here.

In *Salerno*, the Court upheld the Bail Reform Act because "[t]he fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." *Salerno*, 481 U.S. at 745. Under this standard, the never-enforced partial-birth abortion law must be upheld. There is no evidence of an unconstitutional application of this law, and it is obviously susceptible of constitutional applications.

It is time to recognize *Salerno* and no longer pretend that it does not exist in the abortion context. Courts below have successfully applied *Salerno* in the abortion context. *See McGuire v. Reilly*, 386 F.3d 45, 57 (1st Cir. 2004), *cert. denied*, 125 S. Ct. 1827 (2005) (denying a facial challenge to restrictions on sidewalk counselors advising against abortion). In *Barnes v. Moore*, the Fifth Circuit upheld the use of *Salerno* on precedential grounds: "we do not interpret *Casey* as having overruled, *sub silentio*, longstanding Supreme Court precedent governing challenges to the facial constitutionality of statutes." 970 F.2d 12, 14 n.2 (5th Cir.), *cert. denied*, 506 U.S. 1013 (1992). The Fourth Circuit held likewise. "We begin by emphasizing . . . that the challenge to [the abortion clinic regulation] is a facial one and therefore 'the most difficult challenge to mount successfully, since the chal-

lenger must establish that no set of circumstances exists under which the Act would be valid.'" *Greenville Women's Clinic v. Comm'r, S.C. Dept. of Health & Envtl. Control*, 317 F.3d 357, 362 (4th Cir. 2002), *cert. denied,* 538 U.S. 1008 (2003) (quoting *Salerno*, 481 U.S. at 745). *See also Okpalobi v. Foster*, 244 F.3d 405, 427 n.35 (5th Cir. 2001); *Manning v. Hunt*, 119 F.3d 254, 268-69 (4th Cir. 1997).

The *Salerno* test works remarkably well and it is long overdue for this Court to apply it directly to abortion just as it does to other regulations of conduct. Prior to *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), this Court repeatedly cited *Salerno* in abortion cases. *See, e.g., Rust v. Sullivan*, 500 U.S. 173, 183 (1991); *Webster v. Reproductive Health Services*, 492 U.S. 490, 524 (1989) (O'Connor, J., concurring). But in *Casey* all five Justices affirming *Roe v. Wade* ignored *Salerno*, despite its reference by the four Justices who felt *Roe* should be overruled. *Casey*, 505 U.S. at 972 (Rehnquist, C.J., White, Scalia and Thomas, JJ., concurring in part and dissenting in part) ("Furthermore, because this is a facial challenge to the Act, it is insufficient for petitioners to show that the notification provision 'might operate unconstitutionally under some conceivable set of circumstances.'") (quoting *Salerno*, 481 U.S. at 745). The *sine qua non* of legislating from the bench is violating Rule of Law in an arbitrary manner, without even distinguishing applicable precedent. There should be uniform application of *Salerno* to abortion cases.[4]

Salerno has not always been applied in the context of free speech, which is essential to self-government. Abortion plainly does not qualify for this solicitude. In *Schneider v.*

---

[4] Most recently, the Court implicitly applied the standard of *Salerno* to the abortion context in *Ayotte v. Planned Parenthood*, 126 S. Ct. 961 (2006), albeit without ever citing *Salerno*. But unlike *Ayotte*, there is nothing to remand here.

New Jersey 308 U.S. 147 (1939), the Court held that "the freedom of speech and that of the press [are] fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men." *Id.* at 161. Because of this fundamental importance to the functioning of a democratic society, First Amendment challenges to laws are judged under an "undue burden" standard to prevent an atmosphere of self-censorship caused by overly broad statutes. Allowing a litigant to utilize this standard "is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." *Gooding v. Wilson*, 405 U.S. 518, 521 (1972).

In sharp contrast, abortion is not a right of expression, nor is it essential to the functioning of a free government under the *Schneider* interpretation. No one, regardless of his or her position on abortion, can regard it as fundamental to the successful functioning of a democracy. The fact that this Court has not extended the "undue burden" standard to cases involving the fundamental rights of the Fifth and Eighth Amendments (to use the issue in *Salerno* as an example) illustrates the unique role played by the First Amendment, which has no application here.

This Court should apply *Salerno* to this case and remand for entry of judgment for Petitioner.

B. An Unconstitutional Application of the Partial-Birth Abortion Ban Act Is Unlikely Ever to Occur.

Once effective, the Partial-Birth Abortion Ban Act would almost certainly never be applied in a manner that is unconstitutional according to plaintiffs' arguments. Two highly

unlikely, or even impossible, events must occur before there would be a bona fide challenge to the partial-birth abortion statute based on health. First, a patient must somehow have a medical condition requiring partial-birth abortion which is *outside* of the existing statutory exception for life, but *inside* a constitutionally mandated exception. According to the exhaustive findings of Congress and medical authorities such as the American Medical Association, that is the null set: no such conditions exist. *See* Partial-Birth Abortion Ban Act of 2003 § 2(8), Pub. L. No. 108-105, 117 Stat. 1201, 1202 (partial-birth abortion "is never medically necessary") (quoted by *Carhart*, 413 F.3d at 793). Second, it would be highly unlikely for there to be a prosecution and conviction of a physician for undertaking what the courts (and juries) may view as a necessary procedure. The combination of those two exceedingly unlikely events is simply too remote to justify invalidating an Act of Congress.

No one is fooled by the invalidation of a statute based on a highly unlikely implementation. The true effect is to give the abortionist the power to make the law, not obey it. Justice Kennedy explained this effect in *Carhart*:

> the Court awards each physician a veto power over the State's judgment that the procedures should not be performed. . . . Requiring Nebraska to defer to [one physician's] judgment is no different than forbidding Nebraska from enacting a ban at all; for it is now [the physician] who sets abortion policy for the State of Nebraska, not the legislature or the people. *Casey* does not give precedence to the views of a single physician or a group of physicians regarding the relative safety of a particular procedure.

Carhart at 964-65 (Kennedy, J., dissenting). The subsequent invalidation of the Partial-Birth Abortion Ban Act proved how right Justice Kennedy was.

The facts at bar do not present an unconstitutional application of the Partial-Birth Abortion Ban Act. Accordingly, this Court should remand for entry of judgment for Petitioner.

III. THIS COURT SHOULD RETURN ISSUES OF HEALTH AND ABORTION TO THE DEMOCRATIC PROCESS, AND THEREBY OVERRULE *STENBERG V. CARHART* AND *DOE V. BOLTON.*

There is no constitutional or logical basis for an open-ended health exception to an otherwise valid abortion regulation. This error of *Stenberg v. Carhart* and, originally, *Doe v. Bolton*, 410 U.S. 179 (1973), should be overruled. No provision of the Constitution supports the expansive health exception outlined in these cases. Rather than compounding the error of a "health exception," this Court should correct it here before it distorts the law further.

A. *Stenberg v. Carhart* and *Doe v. Bolton* Should be Overruled.

The genesis of a court-imposed health exception to an abortion law was *Doe v. Bolton*:

> We agree with the District Court, 319 F.Supp., at 1058, that the medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.

410 U.S. at 192. This should be overruled.

The *Doe v. Bolton* Court cited no basis—constitutional or otherwise—for imposing this requirement of a health exception. The only relevant citation was to *United States v. Vuitch*, 402 U.S. 62 (1971), in which the Court reinstated an

indictment for abortion against a void-for-vagueness challenge. But there the Court interpreted "health" as a matter of statutory construction, not as a constitutional requirement. *Id.* at 71-72. Nothing in *Vuitch* suggests that the Constitution requires a health exception.

The health exception is judge-made law in its most objectionable form. It lacks any constitutional foundation today, just as it did back in 1973. Since then the Court majority has rarely cited *Doe v. Bolton* favorably for its health exception. The bald assertion in *Doe v. Bolton* of a constitutional right to a sweeping health exception was a fundamental mistake that begs for correction.

No decision of the Court in 25 years has included a meaningful endorsement of *Doe v. Bolton* for its proposition that an open-ended health exception is a constitutional requirement. Earlier there were fleeting references to health by Justice Blackmun in *Colautti v. Franklin*, again without any meaningful support. 439 U.S. 379, 384, 387-88, 400 (1979). Justice Blackmun repeated the statement in *Bolton* that "'a pregnant woman does not have an absolute constitutional right to an abortion on her demand,'" but obviously a broad health exception does precisely that: mandate abortion on demand. *Id.* at 387 (quoting *Bolton*, 410 U.S. at 189). By the time of *Franklin*, Chief Justice Burger had realized that the Court majority was ignoring his understanding, as set forth in his concurrence in *Doe v. Bolton*, that there would not be abortion on demand, and he joined the dissent in *Franklin*.

The court below did not fare any better in finding support for its demand for a general health exception. It relies on passing references to a health exception in *Stenberg v. Carhart*, but there was no reason given in that decision for why the Constitution might require a health exception beyond preservation of one's life. Instead, that decision merely cites prior Supreme Court decisions that similarly lack any cogent constitutional reason for a broad health exception to a gen-

erally applicable law. 530 U.S. at 930. For example, the *Carhart* decision cited *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 768-69 (1986), but that decision noted how the issue was not contested by the attorneys in that case. Moreover, the issue there turned on statutory interpretation, not constitutional mandate.

Far more than 3,000 law review articles mention abortion, but only a scant 181 even mention the "health ~~exce~~ption," which is the legal basis for many abortions. The articles often refer to *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), which notably did not cite *Doe v. Bolton* or the broad health exception that it created. Instead, the plurality decision in *Casey* narrowed the health exception to very specific and serious conditions that gravely threatened the mother. The partial-birth abortion statute already provides similar protection, and the decision below fails to cite specific medical conditions not covered by the exception already in the statute. The handful of references to *Doe v. Bolton* in the second edition of Professor Laurence Tribe's *American Constitutional Law* (1988) likewise lack any justification for an open-ended health exception to an abortion law.

The "Doe" in *Doe v. Bolton*, Sandra Cano, testified before the United States Senate Committee on the Judiciary on June 23, 2005. She declared how she "did not seek an abortion" and was manipulated in the case to advance the interests of the abortion providers:

> I was in court under a false name and lies. I was never cross-examined in court. *Doe v. Bolton* is based on a lie and deceit. It needs to be retried or overturned. *Doe v. Bolton* is against my wishes.[5]

---

[5] *See supra* n.2.

History is repeating itself in this case, where the interest of abortion providers is advanced using the pretext of claims about patients that may not even be true. By repeatedly giving abortionists preferential treatment in facially invalidating abortion regulations, the judiciary has become hostage to the demands of the abortion industry.

B. Performed Under the Guise of "Health", Abortions Have a Very Unhealthy Effect.

The irony is that invalidation of statutes regulating abortion, ostensibly in the name of "health", often has a most unhealthy result. The hideous fate for the unborn children is obvious. But the mothers and their future children also suffer grim health injuries from abortion. "At least 49 studies have demonstrated a statistically significant increase in premature births (PB) or low birth weight (LBW) risk in women with prior induced abortions (IAs)." Brent Rooney and Byron C. Calhoun, "Induced Abortion and Risk of Later Premature Births," 8 J. Am. Physicians & Surgeons 46 (Summer 2003).[6] Premature birth tragically causes brain damage, and an array of other severe, lifelong injuries ranging from Cerebral Palsy to blindness, and few mothers would knowingly increase the risk of that happening.[7] Researchers Rooney and Calhoun observed:

> Large studies have reported a doubling of [early premature birth] EPB risk from two prior IAs. Women who had four or more IAs experienced, on average, nine times the risk of [extremely early premature births] XPB, an increase of 800 percent. These results suggest that women contemplating IA should be informed of this potential risk to subsequent pregnancies, and that physi-

---

[6] http://www.jpands.org/vol8no2/rooney.pdf (viewed Aug. 3, 2005).

[7] March of Dimes, *Complications of Premature Birth*, at http://www.marchofdimes.com/prematurity/5512.asp (viewed Aug. 3, 2005).

cians should be aware of the potential liability and possible need for intensified prenatal care.

Id. *See also* Brent Rooney, Letter, 96 European Journal of Obstetrics & Gynecology and Reproductive Biology, 239 (2001) (citations omitted) ("There are at least seventeen (17) studies that have found that previous induced abortions increase preterm birth risk" and thereby increase debilitating Cerebral Palsy in children).

There are other serious health risks caused by abortion. "Higher death rates associated with abortion persist over time and across socioeconomic boundaries." D.C. Reardon, P.G. Ney, F.J. Scheuren, J.R. Cougle, P.K. Coleman, T. Strahan, "Deaths associated with pregnancy outcome: a record linkage study of low income women," 95 Southern Medical Journal 8, at 834-41 (August 2002). Women who have a family history of breast cancer or other illnesses may be giving themselves the medical equivalent of a death sentence by submitting to an abortion. *See* J.M. Thorp, Jr., K.E. Hartmann, and E.M. Shadigian, "Long-Term Physical & Psychological Health Consequences of Induced Abortion: Review of the Evidence," 58 OB/GYN Survey 1, at 67-79 (2003); Karen Malec, "The Abortion-Breast Cancer Link: How Politics Trumped Science and Informed Consent," 8 J. Am. Physicians & Surgeons 41 (Summer 2003) (the vast majority of studies have found that abortion increases the risk of breast cancer).[8] Even abortion advocates must concede that childbirth has a protective health effect lost to women who undergo abortion.

Dr. Angela Lanfranchi, M.D., F.A.C.S., has explained the physiology and epidemiology of the abortion-breast cancer

---

[8] http://www.jpands.org/vol8no2/malec.pdf (viewed Aug. 3, 2005).

link, and introduced her article on the topic with this observation:

> This past August in Minneapolis, Patrick Carroll, director of the Pension and Population Research Institute of London, presented a paper to the largest gathering of statisticians in North America. He showed that abortion was the best predictor of breast cancer in Britain. Breast cancer is the only cancer in Britain which has its highest incidence and mortality rate among the upper rather than lower social classes. Abortion before a full term pregnancy and late pregnancy were the best explanations for this incidence. He also found that there had been a 70% increase risk of breast cancer between 1971 and 2002 and that for women between 50 and 54 years of age incidence was highly correlated with abortion.

Angela Lanfranchi, M.D., F.A.C.S, "The breast physiology and the epidemiology of the abortion breast cancer link," 12 *Imago Hominis*, No. 3, 228 (2005).[9]

Tobacco companies concealed the harmful effects of smoking for decades, so it should surprise no one that abortion advocates deny the medical harm of their trade. But there is no doubt that abortion is deleterious to public health. "Thirty-eight epidemiological studies exploring an independent link [between abortion and] breast cancer have been published. Twenty-nine report risk elevations. Thirteen out of 15 American studies found risk elevations. Seventeen studies are statistically significant, 16 of which report increased risk." Karen Malec, *supra*, at 41 (citations omitted).

Demographic data among similar ethnic groups likewise illustrate the harmful effects on health caused by abortion. Breast cancer rates are far lower in Western countries that prohibited abortion than in those that promoted it. Ireland,

---

[9] http://www.abortionbreastcancer.com/Lanfranchi060201.pdf (viewed May 16, 2006).

which virtually bans abortion, reportedly has a lifetime rate of breast cancer of only 1 in 13, nearly half the rate of 1 in 7.5 in the United States. *See* "Probability of breast cancer in American Women," National Cancer Institute (Apr. 15, 2005);[10] K. O'Flaherty, R. Oakley, "Self-checks 'useless' in breast cancer fight." *Sunday Tribune* (Ireland), at 8 (Oct. 6, 2002). The rate of breast cancer increases steadily as one travels from Ireland, where abortion is illegal, to Northern Ireland, where abortion is legal but rare, to England, where abortion is common. *See* R. O'Reilly, "New weapon in war against breast cancer," *The Press Association Limited* (Dec. 17, 1998); "Portugal-abortion referendum," *Associated Press Worldstream* (June 27, 1998).

In Romania, abortion was illegal under two decades of rule by the dictator Nicolae Ceausescu, and the country enjoyed one of the lowest breast cancer rates in the entire world during that time, far lower than comparable Western countries. Romania's breast cancer rate was an astounding one-sixth the rate of the United States. *See* A. Khan, "The role of fat in breast cancer," *The Independent* (May 18, 1998). But after the execution of Ceausescu on Christmas Day, 1989, Romania has taken the opposite approach, embracing abortion to the point that Romania now has one of the highest abortion rates in the world. *See* N. Abdullaev, "Russians are quickest to marry and divorce," *Moscow Times* (Dec 8, 2004). One Romanian observer decried, "The liberalization of abortions in Romania in 1990, the significant increase of the number of abortions at relatively short intervals, determined a rise in the incidence of breast and uterine cervix cancer in my country." Information packet, Women's Environment and Development Organization (WEDO) World Conference on Breast Cancer (July 1997).

---

[10] http://cis.nci.nih.gov/fact/5_6.htm (viewed Aug. 3, 2005).

There should be no judicially imposed health exception to a procedure that is, in fact, so harmful to health. Imagine the absurdity of a judicially imposed health exception to a ban on smoking.

C. The Democratic Process Is Superior to the Judiciary for Sorting Out Health Issues.

"'Irrespective of the difficulty of the task, legislatures, with their superior factfinding capabilities, are certainly better able to make the necessary judgments than are courts.'" *Carhart*, 530 U.S. at 968 (Kennedy, J., dissenting, quoting *City of Akron*, 462 U.S. at 456, n. 4). Justice Kennedy's observation applies again here.

Federal courts have virtually no experience with medical operations. Where "it is difficult to conceive of an area of governmental activity in which the courts have less competence," the Court has emphasized the need for deference and judicial restraint. *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (deferring to military). As slight as the experience of federal courts is in military matters, it is markedly scarcer in medical issues. Federal judges often do have personal experience in the military, but almost none has any medical training or experience.

In contrast, legislatures often include many experienced physicians (Congress has had many physician members, and the Majority Leader of the U.S. Senate is a surgeon), and, more importantly, the legislative process can benefit from a wide range of medical input and related factfinding along with full participation by the public. In sharp contrast, judicial proceedings are confined to a few handpicked "experts" paid for their time to deliver a desired opinion. There is little public scrutiny of what they say and deliberation is limited to a single person untrained in medicine rather than a group of legislators who can draw upon medically experienced staffs and constituents. If courts are poor venues for deciding

military issues, then they are even less suited to pass judgment on medical implications of a surgical procedure. The highest level of judicial restraint is warranted here.

Judicial invalidation by a court of an abortion law "on its face," without even developing a factual record of implementation of the statute, is particularly unwarranted. Courts, already unsuited for rendering legislative decisions, are even less equipped for deciding complex issues without the benefit of a full factual record.

In *Carhart*, one federal court struck down a law used by 31 states despite the lack of a factual record of statutory implementation:

> The United States District Court in this case leaped to prevent the law from being enforced, granting an injunction before it was applied or interpreted by Nebraska. In so doing, the court excluded from the abortion debate not just the Nebraska legislative branch but the State's executive and judiciary as well. The law was enjoined before the chief law enforcement officer of the State, its Attorney General, had any opportunity to interpret it. The federal court then ignored the representations made by that officer during this litigation. In like manner, Nebraska's courts will be given no opportunity to define the contours of the law, although by all indications those courts would give the statute a more narrow construction than the one so eagerly adopted by the Court today. Thus the court denied each branch of Nebraska's government any role in the interpretation or enforcement of the statute. This cannot be what *Casey* meant when it said we would be more solicitous of state attempts to vindicate interests related to abortion. *Casey* did not assume this state of affairs.

530 U.S. at 978-79 (Kennedy, J., dissenting) (citations omitted). Justice Kennedy observed that even in the facial challenge that invalidated the law, "no expert called by Dr. Carhart, and no expert testifying in favor of the procedure,

had in fact performed a partial-birth abortion in his or her medical practice." *Id.* at 966 (Kennedy, J., dissenting).

Legislation concerning medical procedures is an area where judicial competence is at its nadir. Were medical research to uncover tomorrow an additional harm caused by abortion, legislatures could immediately consider and act upon such information. Courts, however, could not. It would be years, perhaps decades, before courts could factor the revelation into jurisprudence; when a court couches its ruling in the authority of the Constitution, it may even take several generations to correct the error.

As Judge Edith Jones wrote in reviewing a legal attempt by the original "Roe" in *Roe v. Wade* to overturn that precedent, "[h]ard and social science will of course progress even though the Supreme Court averts its eyes." *McCorvey v. Hill*, 385 F.3d 846, 852-53 (5th Cir. 2004), *cert. denied*, 125 S. Ct. 1387 (2005) (Jones, J, concurring). Judge Jones continued:

> One may fervently hope that the Court will someday acknowledge such developments and re-evaluate *Roe* and *Casey* accordingly. That the Court's constitutional decision making leaves our nation in a position of willful blindness to evolving knowledge should trouble any dispassionate observer not only about the abortion decisions, but about a number of other areas in which the Court unhesitatingly steps into the realm of social policy under the guise of constitutional adjudication."

Id. at 853. The time for that reevaluation has arrived in this case.

CONCLUSION

The same rules that govern other challenges to Acts of Congress should apply to the abortion providers in this case. This Court does not require health exceptions from other generally applicable criminal laws. This Court does not invalidate, based on facial challenges, conduct-based statutes permitting constitutional application. *Doe v. Bolton* and *Stenberg v. Carhart* should be overruled.

Remand for entry of judgment in favor of Petitioner is appropriate here.

Respectfully submitted,

ANDREW L. SCHLAFLY
939 OLD CHESTER ROAD
FAR HILLS, NJ 07931
(908) 719-8608

Counsel for Amicus Curiae

Dated: May 19, 2006